Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO P696 OF 1985
LIM BENG CHOON J
30 DECEMBER 1992

Tort — Defamation — Libel — Ordinary and natural meaning of words complained of — Whether words defamatory

Tort — Defamation — Libel — Defence of justification — What defendants must prove — Defamation Act 1957 s 8

Tort — Defamation — Libel — Fair comment — Honest expression of opinion — Test of fair comment — Defamation Act 1957 s 9

Tort — Defamation — Libel — Malice — Whether defendants deliberately or recklessly abstained from proper enquiries

The plaintiffs ('ICM') claimed against the defendants for damages for libel in respect of the words contained in an article entitled 'British "diploma mills" step up sales racket' published by the defendants in the *New Straits Times* dated 29 April 1985. The issues involved in this action concerned:

(i) the very important issue as to the ordinary and natural meaning of the words complained of;
(ii) whether the defence of justification was available to the defendants;
(iii) whether the defence of fair comment on matters of public interest was available to the defendants; and
(iv) whether the defendants were actuated by malice. This issue will only arise if the third issue is in the affirmative as the defence of fair comment on matters of public interest is of no avail when it is shown that the defendants were actuated by malice when publishing the article.

ICM alleged that by the words published in the article in their natural and ordinary meaning or by innuendo, the defendants meant and were understood and taken to mean that ICM was advertising actively in Malaysia to sell bogus qualifications and that ICM was a bogus educational institution. ICM also alleged that the said words were calculated to injure and disparage ICM in its trade as an educational establishment and examining body. The defendants, whilst admitting that they did publish the article in question, categorically denied that they printed the article falsely and maliciously of the plaintiffs. They averred that the headline 'British "diploma mills" step up sales racket' and the first to the sixth paragraphs of the article did not refer to the plaintiffs or were not understood to refer to or were or ever capable of referring to the plaintiffs. The defendants then went on to aver that

A the said words in the article were fair comment and made without malice upon a matter of public interest, namely, that ICM was providing a course of study which ICM alleged leads up to the conferment of qualifications which entitle students to gain admission to institutions of higher learning. In their defence of fair comment, the defendants relied on the fact that ICM were incorporated in Ireland and that ICM's qualifications were not sufficient to gain entry into 34 higher learning institutions in the UK.

Held, giving judgment for the plaintiffs and awarding damages:

(1) It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. The test which the plaintiff has to furnish an answer to satisfy the court is whether the words would reasonably in the circumstances lead persons acquainted with the plaintiff to believe that he was the person referred to. In considering the question of identity, paras 7, 8 and 9 of the article cannot be read in isolation. They must be read in the proper context in which they were set out. The gist of the article is that certain organizations based in England were advertising actively in Malaysia to sell their bogus qualifications. Having said all these, the author went on to draw the attention of readers to an advertisement placed by ICM which was offering a diploma in business studies course through a local educational institution. Under the circumstances, the court has no doubt whatsoever that the article sets out as clearly as possible that ICM was one of those organizations referred to in the article. Having arrived at the conclusion that ICM was linked by the author of the article to other English organizations which operated 'diploma mills' to sell their bogus qualifications, the inevitable conclusion which any reasonable reader of the article could only arrive at is that the article is certainly defamatory to the plaintiffs.

(2) On the second issue, it is a complete defence to an action of libel, and slander that the defamatory imputation is true. The defendant must prove the truth of the very imputation complained of. From the evidence there is no doubt firstly, that ICM is registered in the Republic of Ireland. But ICM is also registered in the UK as a foreign company. The mention of this was omitted in the article. By this omission, it is clear to the court that the author of the article was at the material time trying to emphasize in his article when read as a whole that ICM had no standing whatsoever in England. There is equally no doubt in the court's view that the author had succeeded in creating doubts in the mind of an ordinary reasonable reader of the article regarding the authenticity of any degree conferred by ICM. The issue of registration therefore, gives additional strength to the imputations made against the plaintiffs in the article. As regards to the defendants' contention that the qualifications conferred by the plaintiffs are not sufficient to gain entry into some 34 educational institutions even

if it is true, such a contention per se does not warrant the imputation that ICM is a diploma mill and/or a bogus educational institution. The most that could be said for the defendants would be that they must have succeeded in sowing that there was a 'possibility' that the ICM qualifications might well be insufficient to gain entry into the majority of the educational institutions, such a 'possibility' is not sufficient in law for the court to hold that the defendants have succeeded on the balance of probabilities in establishing that the qualifications of ICM are not sufficient to gain entry into the educational bodies. As regards to the allegation in the article that 'ICM had no standing and no status whatsoever with the United Kingdom Examination Board' there is no doubt that this allegation is totally untrue.

(3) The law is not concerned with the motive or intention of the author of the article. What the law is and should be concerned with is the tendency and consequences of the publication which in the present case are clearly defamatory of the plaintiffs in that imputations of operating a diploma mill to sell ICM qualifications were made against them. On the evidence adduced at the trial, ICM have satisfied the court that the author and/or the defendants had at the material time acted maliciously in making and publishing the article complained of. The court had no hesitation at all in holding that the defence of justification relied on by the defendants was wholly without any merits.

(4) On the third issue, there is no doubt that it is a defence to an action of libel that the words complained of are fair comment on a matter of public interest. The court had no hesitation in holding that the article complained of comprised of: (i) bare statements of fact or (ii) the said statements contained in the article were capable of being considered as bare statements of fact. None of the said statements could be classified as comments. No ordinary reasonable reader could construe any of the statements as an expression of comment or opinion of the author. In the court's view, the bona fide of the author in making the statement was highly questionable.

(5) The court does not have the slightest doubt that the defendants deliberately or at least recklessly abstained from availing themselves of means of information which lay at hand when the slightest inquiry would have shown that the imputation appearing in the article complained of were groundless. ICM have succeeded in proving express malice on the part of the author of the article complained of as well as on the part of the defendants.

(6) In calculating the amount of damages, ICM, as a corporation, can only be damaged in its pocket so that it can only be compensated for loss of goodwill and loss of income. The court must also take into account that corporation tax should have been payable on the income loss. Taking all the factors into consideration, the court awarded a sum of RM100,000 as compensatory damages with interest at the rate of 8%pa from the date of judgment till

A date of realization. The court also awarded a sum of RM12,795.66 as special damages which sum shall carry interest at the rate of 4%pa from the date of filing to date of judgment. The claims for examplary or punitive damages in addition to aggravated compensatory damages were dismissed.

B **Per curiam:**

Although in the publication of defamatory matters, malice is presumed but if it is sought to destroy the defence of fair comment on matters of public interest by an allegation that the defendant was actuated by express malice, particulars of the facts and matters from C which such express malice is to be inferred must be pleaded.

[Bahasa Malaysia summary

Plaintif ('ICM') menuntut terhadap defendan ganti rugi kerana libel berhubung dengan perkataan yang terkandung di dalam suatu rencana D yang bertajuk 'British "diploma mills" step up sales racket' yang diterbitkan oleh defendan di dalam *New Straits Times* bertarikh 29 April 1985. Isu yang terlibat dalam tindakan ini berkenaan:

(i) isu yang sangat penting tentang makna biasa perkataan yang diadukan;
E (ii) sama ada pembelaan justifikasi terbuka kepada defendan;
(iii) sama ada pembelaan komen berpatutan atas perkara yang menarik perhatian orang ramai terbuka kepada defendan; dan
(iv) sama ada defendan didorong oleh niat-jahat. Isu ini hanya akan timbul jika isu ketiga diiakan kerana pembelaan komen berpatutan F atas perkara yang menarik perhatian orang ramai tidak berguna jika ditunjukkan bahawa defendan didorong oleh niat-jahat apabila menerbitkan rencana itu.

ICM mengatakan bahawa dengan menggunakan perkataan yang diterbitkan di dalam rencana itu dalam maksud biasanya atau meng- G ikut sindiran, defendan bermaksud dan difahamkan serta dianggap bermaksud bahawa ICM mengiklan dengan giat di Malaysia untuk menjual kelulusan palsu dan bahawa ICM adalah institusi pendidikan yang palsu. ICM juga mengatakan bahawa perkataan tersebut dimaksudkan untuk mencela dan memperkecilkan ICM dalam perniagaannya sebagai suatu institusi pendidikan dan badan pemeriksaan. H Walaupun defendan mengaku yang mereka telah menerbitkan rencana yang dipersoalkan itu, mereka menafikan tanpa syarat yang mereka telah salah menerbitkan rencana itu dan dengan berniat-jahat terhadap plaintif. Mereka menegaskan bahawa tajuk rencana itu 'British "diploma mills" step up sales racket' dan perenggan pertama hingga I keenam rencana itu tidak merujuk kepada plaintif atau tidak dimaksudkan untuk merujuk kepada plaintif atau boleh pernah merujuk kepada plaintif. Defendan kemudian menegaskan bahawa perkataan dalam rencana itu adalah komen berpatutan dan dibuat tanpa niat-jahat atas perkara yang menarik perhatian orang ramai, iaitu, bahawa ICM

memberi kursus pengajian yang ICM mengatakan membawa kepada penganugerahan kelulusan yang membolehkan penuntut memasuki institusi pendidikan yang lebih tinggi. Dalam pembelaan komen berpatutan mereka, defendan bergantung pada fakta bahawa ICM diperbadankan di Ireland dan bahawa kelulusan ICM tidak mencukupi untuk mendapat masuk ke dalam 34 institusi pendidikan yang lebih tinggi di UK.

Diputuskan, memberi penghakiman kepada plaintif dan mengaward ganti rugi:

(1) Adalah suatu unsur penting kausa tindakan fitnah bahawa perkataan yang diadukan itu harus diterbitkan mengenai plaintif. Ujian yang plaintif harus memberi jawapan untuk memuaskan hati mahkamah ialah sama ada perkataan itu akan secara munasabah dalam keadaan yang ada menyebabkan orang ramai yang mengenali plaintif mempercayai bahawa dialah orang yang dirujuknya. Dalam mempertimbangkan soalan identiti, perenggan 7, 8 dan 9 rencana itu tidak boleh dibaca secara berasingan. Mereka harus dibaca dalam konteks yang betul dalam mana mereka dibentangkan. Inti rencana itu ialah bahawa organisasi tertentu yang mempunyai pusat operasi di England mengiklan dengan giat di Malaysia untuk menjual kelulusan palsu mereka. Setelah menyatakan semua ini, penulis itu seterusnya menarik perhatian pembaca kepada suatu iklan yang ditempatkan oleh ICM yang menawarkan diploma dalam kursus pengajian perniagaan melalui suatu institusi pendidikan tempatan. Dalam keadaan demikian, mahkamah tidak syak lagi bahawa rencana itu membentangkan dengan seberapa jelasnya bahawa ICM adalah satu daripada organisasi yang dirujuk dalam rencana itu. Dengan membuat kesimpulan bahawa ICM dihubungkan oleh penulis rencana itu dengan organisasi Inggeris yang lain yang menguruskan 'diploma mills' untuk menjual kelulusan palsu mereka, kesimpulan tunggal yang tidak boleh dielak yang seseorang pembaca waras rencana itu akan membuat ialah bahawa rencana itu sudah pasti memfitnah plaintif.

(2) Mengenai isu kedua, adalah pembelaan sempurna dalam suatu tindakan libel dan slander bahawa tohmah fitnah itu memang benar. Defendan mesti membuktikan kebenaran tohmah yang diadukan itu. Daripada keterangan tidak syak lagi pertamanya, bahawa ICM didaftarkan di Republik Ireland. Tetapi ICM juga didaftarkan di UK sebagai syarikat asing. Fakta ini tidak disebutkan di dalam rencana itu. Dengan peninggalan ini, adalah jelas pada mahkamah bahawa penulis rencana itu pada masa material itu cuba menekankan di dalam rencana itu apabila dibaca seluruhnya bahawa ICM tidak mempunyai kedudukan apa pun di England. Pada masa yang sama, tiada syak lagi pada pendapat mahkamah bahawa penulis itu telah berjaya menimbulkan keraguan dalam fikiran seseorang pembaca waras rencana itu tentang ketulenan sebarang kelulusan yang dianugerahkan oleh ICM. Isu pendaftaran

oleh demikian memberi kekuatan tambahan kepada tohmah yang dibuat terhadap plaintif di dalam rencana itu. Berhubung dengan dakwaan defendan bahawa kelulusan yang dianugerahkan oleh plaintif tidak mencukupi untuk mendapat masuk ke dalam 34 institusi pendidikan walaupun ia benar, dakwaan seperti itu dengan sendirinya tidak mewajarkan tohmah yang ICM ialah sebuah 'diploma mill' dan/atau suatu institusi pendidikan palsu. Setinggi-tingginya yang boleh dikatakan untuk defendan ialah bahawa mereka pasti telah berjaya memupuk kemungkinan yang kelulusan ICM boleh jadi tidak mencukupi untuk mendapat masuk ke dalam kebanyakan institusi pendidikan, kemungkinan seperti itu tidak mencukupi dari segi undang-undang untuk mahkamah memutuskan bahawa defendan telah berjaya atas imbangan kebarangkalian menunjukkan yang kelulusan ICM tidak mencukupi untuk mendapat masuk ke dalam institusi pendidikan itu. Mengenai tuduhan di dalam rencana itu bahawa ICM tidak mempunyai kedudukan atau status apa pun dengan Lembaga Pemeriksaan United Kingdom tiada syak lagi bahawa tuduhan ini memang tidak benar.

(3) Undang-undang tidak menaruh perhatian kepada motif atau niat penulis rencana itu. Undang-undang harus menaruh perhatian kepada kecenderungan dan akibat penerbitan yang dalam kes ini dengan jelas memfitnah plaintif, iaitu tohmah menguruskan 'diploma mill' untuk menjual kelulusan ICM dibuat terhadap mereka. Atas keterangan yang dikemukakan di perbicaraan, ICM telah memuaskan hati mahkamah bahawa penulis dan/atau defendan pada masa material itu telah bertindak dengan niat-jahat dalam membuat dan menerbitkan rencana yang diadukan itu. Mahkamah tanpa apa-apa keraguan memutuskan bahawa pembelaan justifikasi pada mana defendan bergantung tidak mempunyai merit sama sekali.

(4) Mengenai isu ketiga, tidak syak lagi bahawa ia adalah pembelaan kepada suatu tindakan libel bahawa perkataan yang diadukan itu merupakan komen berpatutan atas perkara yang menarik perhatian orang ramai. Mahkamah tiada apa-apa keraguan dalam memutuskan bahawa rencana yang diadukan itu terdiri daripada: (i) pernyataan fakta sahaja atau (ii) pernyataan tersebut yang terkandung di dalam rencana itu boleh dianggap sebagai pernyataan fakta sahaja. Tidak satu daripada pernyataan itu boleh dikelaskan sebagai komen. Tiada pembaca waras biasa boleh mentafsir sebarang pernyataan itu sebagai suatu penyataan komen atau pendapat penulis. Dalam pendapat mahkamah, bona fide penulis membuat pernyataan itu boleh sangat dipersoalkan.

(5) Mahkamah tidak syak sama sekali bahawa defendan dengan sengaja atau sekurang-kurangnya dengan melulu menahan diri daripada menggunakan sumber maklumat yang sentiasa ada sedangkan siasatan sedikit pun akan menunjukkan bahawa tohmah yang wujud dalam rencana yang diadukan itu adalah tidak berasas. ICM telah berjaya membuktikan niat-jahat yang nyata pada

pihak penulis rencana yang diadukan itu dan juga pada pihak defendan. A

(6) Dalam mengira amaun ganti rugi, ICM, sebagai suatu perbadanan, hanya boleh dirugikan dari segi kewangan jadi ia hanya boleh diberi pampasan bagi kehilangan nama baik dan kehilangan pendapatan. Mahkamah mesti juga mempertimbangkan yang cukai perbadanan seharusnya kena dibayar atas pendapatan yang hilang. B Dengan mempertimbangkan semua faktor, mahkamah mengaward jumlah RM100,000 sebagai ganti rugi pampasan bersama faedah pada kadar 8% setiap tahun daripada tarikh penghakiman hingga tarikh penghasilan. Mahkamah juga mengaward jumlah RM12,795.66 sebagai ganti rugi khas dan jumlah ini akan membawa faedah pada kadar 4% setiap tahun daripada tarikh pemfailan C hingga tarikh penghakiman. Tuntutan untuk ganti rugi teladan atau punitif sebagai tambahan kepada ganti rugi pampasan yang lebih berat ditolak.

Per curiam: D

Walaupun dalam penerbitan perkara fitnah, niat-jahat diduga tetapi jika dimaksudkan untuk memusnahkan pembelaan komen berpatutan atas perkara yang menarik perhatian orang ramai dengan pengataan bahawa defendan didorong oleh niat-jahat yang nyata, butir-butir fakta dan perkara daripada mana inferens niat-jahat yang nyata boleh E dibuat mesti dijadikan pli.]

[*Editorial Note:* The defendants have appealed to the Supreme Court vide Civil Appeal No 02–9 of 1993.]

Cases referred to F

1 *David Syme v Canavan* (1918) 25 CLR 234 (folld)
2 *Le Fanu v Malcolmson* (1848) 1 HL Cas 637; [1843–60] All ER Rep 152 (folld)
3 *Lewis v Daily Telegraph Ltd* [1964] AC 234 (folld)
4 *AJA Peter v OG Nio & Ors* [1980] 1 MLJ 226 (folld)
5 *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390 G (refd)
6 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 (refd)
7 *Hough v London Express* [1940] 2 KB 507 (refd)
8 *Plato Films v Speidel* [1961] AC 1090 (refd)
9 *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66 H (refd)
10 *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 319 (folld)
11 *Kemsley v Foot & Ors* [1952] 1 All ER 501; [1952] AC 345 (folld)
12 *Sutherland v Stopes* [1925] AC 47 (folld)
13 *Turner v Metro-Goldwyn Mayer Pictures Ltd* [1950] 1 All ER 449 (refd) I
14 *London Artists Ltd v Littler* [1969] 2 QB 375 (refd)
15 *Horrocks v Lowe* [1975] AC 135 (refd)
16 *Subramaniam v PP* [1956] 2 PCC 55 (refd)
17 *Clark v Moly News* [1877] 3 QBD 248 (refd)

A 18 *Datuk Harris bin Mohd Salleh v Abdul Jalil bin Ahmad & Anor* [1984] 1 MLJ 97 (folld)
19 *Cassel v Broome* [1972] AC 1027 (refd)
20 *Praed v Graham* [1889] 24 QBD 53 (refd)
21 *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 (refd)

B **Legislation referred to**
Defamation Act 1957 ss 8, 9

Wee Choo Keong (*Wee Choo Keong & Faaiz*) for the plaintiffs.
C Abraham and *N Navaratnam* (*Shearn Delamore & Co*) for the defen-
C dants.

Cur Adv Vult

Lim Beng Choon J: In this action, the plaintiffs are claiming against the
D defendants damages for libel in respect of the words contained in an article entitled 'British "diploma mills" step up sales racket' published by the defendants on p 4 of the issue of the *New Straits Times* dated 29 April 1985. The trial of this action is concerned with the usual, and in this case a very important issue as to the ordinary and natural meaning of the words complained of. The second issue is whether the defence of justification
E avails the defendants. The third issue is whether the defence of fair comment on matters of public interest likewise avails the defendants. The fourth issue of whether the defendants were actuated by malice will only arise where the answer of this court to the third issue is in the affirmative because the defence of fair comment on matters of public interest is of no
F avail when it is shown that the defendants were actuated by malice in publishing the article.

At the trial, counsel for the plaintiffs in the course of the examination-in-chief of PW1, one Mr AFS Ford, the company secretary and director of education of the plaintiffs' company, attempted to elicit certain facts from the witness in order to sustain the contention that the defendants were
G actuated by express malice in publishing the article. Counsel for the defendants objected to such an attempt made by counsel for the plaintiffs on the ground that the plaintiffs had not pleaded the facts relied on by them to show express malice. I upheld the counsel's objection as I was of the view that in law, although in the publication of defamatory matters, malice is
H presumed but if it is sought to destroy the defence of fair comment on matters of public interest by an allegation that the defendant was actuated by express malice, particulars of the facts and matters from which such express malice is to be inferred must be pleaded (see *Gatley on Libel & Slander* (8th Ed) p 438 para 1064 and the *Supreme Court Practice* (1979 Ed) Vol 1 at p 294 O 18/12/20). Thereupon counsel for the plaintiffs orally
I applied for an amendment to their statement of claim which I refused to accept. I suggested that if the plaintiffs wished to apply to amend its statement of claim they should do so by making a formal written application to amend. This the plaintiffs did and their application was approved by this court. The defendants were accordingly allowed to amend their amended

statement of defence in reply to the amendment of the plaintiffs' statement of claim. The plaintiffs were duly penalized with costs.

I should mention that the plaintiffs in their request for further and better particulars, required the defendants to set out all the facts upon which the defence of fair comment was based. The defendants duly responded and gave particulars of the facts relied on by them to sustain the defence of fair comment. I do not propose to set out the particulars given by the defendants as I will be referring to so much of the particulars presently, insofar as they are relevant.

The article published by the defendants in the *New Straits Times* on 29 April 1985 which the plaintiffs alleged was defamatory reads as follows:

> British 'diploma mills' step up sales racket.
>
> Penang, Sun — 'Diploma mills' based in Britain are advertising actively in Malaysia to sell their bogus qualifications, the principal of South-West London College, Lyndon H Jones, said yesterday.
>
> Mr Jones, who is writing a series of articles to expose such organizations, said these 'diploma mills' sell all sorts of qualifications for a fee of £1,200 or more.
>
> He was speaking to reporters when paying a courtesy call on former Prime Minister, Tunku Abdul Rahman at his Jalan Air Rajah residence.
>
> Mr Jones who is also chairman of the London based Association of Business Executives ('ABE'), was on a three-day visit to Penang to brief Perkim-Goon students on management studies.
>
> About 3,000 Malaysian students who are registered with Perkim-Goon Institute are doing the ABE courses.
>
> 'Most of the organizations selling the dubious certificates advertised overseas to mislead students who are not familiar with the genuine British educational institutions', he said.
>
> Mr Jones said two days ago he saw an advertisement in the local papers by the Institute of Commercial Management ('ICM'), UK, which was offering a diploma in business studies course through a local educational institution.
>
> 'This institute is actually registered in Dublin, Southern Ireland, with only postal boxes in England', he said.
>
> He added that it (ICM) had no standing and no status whatsoever with the United Kingdom Examinations Board.

In para 4 of their amended statement of claim, the plaintiffs alleged that:

> By the said words in their natural and ordinary meaning or by innuendo the defendant meant and were understood and taken to mean:
>
> (a) that the plaintiff is one of the 'diploma mills' advertising actively in Malaysia to sell their bogus qualifications;
> (b) that the plaintiff is a bogus educational institution;
> (c) that the plaintiff sells all sorts of qualifications for a fee of one thousand two hundred sterling pounds or more;
> (d) that the plaintiff did not provide examinations before awarding its diplomas;
> (e) that the plaintiff is out to mislead prospective students, parents, custodians and employers;
> (f) that the sole purpose of the plaintiff's existence is to gain pecuniary advantage by misrepresentation and deception;
> (g) that the plaintiff has no premises to conduct its courses;
> (h) that the plaintiff has no standing whatsoever within the United Kingdom

A and has no connection with any other educational bodies in the United Kingdom; and

(i) that the plaintiff is carrying out unlawful activities in Malaysia and other places.

The plaintiffs then went on to allege in para 5 thereof that: 'The said words B were calculated to injure and disparage the plaintiff in its trade as an educational establishment and examining body.' In para 6 thereof, the plaintiffs further elaborated the injuries suffered by them:

> By reasons of the premises, the plaintiff has been injured in its credit and reputation as an educational establishment and examining body and has been brought into public scandal, odium and contempt and has been put to expense.

C

The plaintiffs therefore alleged that they were entitled to claim:

(1) special damages in the sum of RM13,329.96;
(2) injunction to restrain the defendants, their servants and/or agents from further publication or circulation of the offending article;
(3) damages/aggravated damages;
D (4) exemplary damages;
(5) punitive damages; and
(6) interest and costs.

On the other hand the defendants, whilst admitting that they did publish the article in question on the date as alleged by the plaintiffs, categorically E denied that they printed the article falsely and maliciously of the plaintiffs. In paras 3(ii) and (iii) of their re-amended statement of defence they averred that the headline 'British "diploma mills" step up sales racket' and the first to the sixth paragraphs of the article did not refer to the plaintiffs or were not understood to refer to or were or ever capable of referring to the F plaintiffs. The defendants then went on to aver in para 5 thereof that:

> The said words in the article ... are fair comment and made without malice upon a matter of public interest namely that the plaintiff is providing a course of study which the plaintiff alleges leads up to the conferment of qualifications which entitle students to gain admission to institutions of higher learning.

G Immediately following para 5, the defendants set out particulars of the facts to sustain their defence of fair comment:

> Particulars
>
> (i) that the plaintiff is not registered in the United Kingdom but in the Republic of Ireland ('Ireland');
H (ii) that the plaintiff is not accredited with the United Kingdom Examination Board;
> (iii) that the diploma and other qualifications offered by the plaintiff were not accepted as entry qualifications to institutions of higher learning, full particulars of which are set out in para 6.

I The averments in para 6 of the re-amended statement of defence are in these terms:

> Further or in the alternative these words set out in para 3 of the amended statement of claim in particular subparas 7, 8 and 9 of the said para and the article in question are true in substances and in fact.

Particulars

(i) the plaintiff is incorporated in Ireland;
(ii) the plaintiff's qualifications conferred by the plaintiff is not sufficient to gain entry into the following institutions of higher learning:

and they named and listed some 34 universities and other institutions of higher learning (hereinafter referred to collectively as 'the educational institutions') in Great Britain.

At the trial of this case the, plaintiffs called the following witnesses to testify:

(a) Mr Alastair Francis Sommerville Ford (PW1), the company secretary and director of education of the Institute of Commercial Management, United Kingdom ('ICM');
(b) Mr Tharampal Singh (PW2) the finance and administration executive of Medialatex Sdn Bhd who was a student of ICM from January 1987 to 1989;
(c) Mr Keith Thomas Robert Davies (PW3) an officer of the British Council, Kuala Lumpur in charge of education counselling; and
(d) The Rt Hon Mr Granville Charles Marquis of Huntley (PW4) Member of Parliament in the United Kingdom and who is, among other things, a patron of ICM.

The defendants called only one witness namely Mr Lyndon Jones (DW1) the author of the article in question and who was and still is the chairman of the Association of Business Executives.

The evidence given by the respective witnesses insofar as they are relevant to this case will be referred to presently in this judgment.

Finally, it is relevant to mention that four bundles of documents have been tendered and duly marked as exhibits:

(i) Agreed bundle of documents ('bundle AB').
(ii) Plaintiffs' supplementary (non-agreed) bundle of documents ('bundle SNAB').
(iii) Defendants' (non-agreed) bundle of documents ('bundle DBND').
(iv) Defendants' (non-agreed) supplementary bundle of documents ('bundle SDNBD').

In the course of the trial, this court was informed that the parties had reached an agreement to treat the four bundles of documents tendered as agreed bundles of documents but solely for the purpose of obviating the necessity to call the makers of the documents. No admission was made as to the contents of the documents which had to be proved.

First issue — the ordinary and natural meaning

Central in this action is the meaning of the words used in the article in question. On this issue, the first point to be considered is one of identity, as the article made no express or specific reference to the plaintiffs in the first to the sixth paragraph thereof (which I shall identify those paras as paras 1, 2, 3, 4, 5 and 6 since both counsel in their submission have for convenience

so identified these six paragraphs). Reference to the plaintiffs appear only in the seventh, eighth and ninth paragraphs ('paras 7, 8 and 9'). In the premises, counsel for the defendants in his submission argues that since the article refers only in part to the plaintiffs, ie in the last three paras only, the first six paras thereof cannot therefore be said to bear any reference to the plaintiffs. Furthermore, so says counsel, the words in paras 7–9 are entirely severable from the rest of the article. Counsel also suggested that there are no pointers or indices contained in the words of the article indicating any reference to the plaintiffs.

It is stated by the author of *Gatley on Libel and Slander* (8th Ed) that to succeed in an action of defamation, the plaintiff must not only prove that the defendant published the words and that they are defamatory: he must also identify himself as the person defamed. This proposition is elementary bearing in mind that the law of defamation recognizes in every man a right to have the estimation in which he stands in the opinion of others untarnished by false statements to his discredit. It is therefore an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. What then is the test to which the plaintiff has to furnish an answer to satisfy the court that the words complained of are in fact published of him? Per Isaacs J in *David Syme v Canavan*[1] at p 238, the test is defined in this way:

> The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? *That does not assume that those persons who read the words know, all the circumstances or all the relevant facts.* But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognized; and *whether the description takes the form of a word-picture of an individual or the form of a reference to a class of persons of which he is or believed to be a member or any other form, if in the circumstances the description is such that a person hearing or reading the alleged would reasonably believe that the plaintiff was referred to, that is sufficient reference to him.* (Emphasis added.)

Another case on this point is the case of *Le Fanu v Malcolmson.*[2] In this case, a newspaper article imputed that 'in some of the Irish factories' cruelties were practised upon the employees and the plaintiffs, who were owners of a factory in Ireland, had proven to the satisfaction of the jury that the newspaper article was referring especially to their factory. In an appeal to the House of Lords to arrest judgment for the plaintiff, the appeal was dismissed. In giving judgment, Lord Campbell said at p 668:

> Where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or *whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and christian name were ten times repeated.* (Emphasis added.)

The third case which is relevant is the case of *Lewis v Daily Telegraph Ltd*[3] where Lord Reid at p 258 has this to say about the scope of the natural and ordinary meaning of the words complained of:

> There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. *So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.* I leave aside questions of innuendo where the reader has some special knowledge which might lead him to attribute a meaning to the words not apparent to those who do not have that knowledge. That only arises indirectly in this case. There has been much argument about innuendoes, true or false, and about proper methods of pleadings. My noble and learned friends intend to deal with those matters and I shall not add to their explanations. I shall only make some observations on the footing that in this case there is no question of innuendo in the true sense.
>
> What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. (Emphasis added.)

The aforesaid observation made by Lord Reid in the *Lewis* case[3] was cited in the local case of *AJA Peter v OG Nio & Ors.*[4] In this case an article with the heading, 'Human Relationship' appeared in the defendant's official publication called the 'Pacemaker'. There was no mention of the plaintiff's name in the offending part of the article. However the plaintiff contended that the offending part branded him as a scoundrel for having created human friction among the staff members. Abdul Hamid J (as he then was) gave judgment in favour of the plaintiff and in doing so said at p 233:

> In the light of these principles of law, *it is pertinent to consider a publication in the context in which the words are used and the mode of publication, for example, the prominence given to the heading employed and the nature of the publication, for example, the emphasis placed upon certain words used. They are important considerations because they tend to induce an ordinary man to infer from the words complained of the meaning meant to be understood.* In the case under consideration I find no room for confusion or doubt that viewed from the nature of the publication the defamatory words used were referable to the plaintiff and were so used with the intention of identifying the plaintiff. (Emphasis added.)

It is of course pure common sense that the ordinary reader must have 'rational grounds for his belief that the words refer to the plaintiff'. Counsel also drew my attention to the speech of Lord Reid in the case of *Lewis v Daily Telegraph Ltd.*[3] Here again the words of Lord Reid indicated a test which is not different from that adopted by all the other judges in the cases cited above.

It cannot be disputed that in considering the question of identity in the present case, paras 7, 8 and 9 of the article cannot be read in isolation, they must be read in the proper context in which they were set out (see *Lee Kuan Yew v Derek Gwyn Davies & Ors*[5] at p 398E and also per Lord Denning in *Slim v Daily Telegraph Ltd*[6] at p 168.) In other words, the article must be read as a whole — see para 102 of *Gatley on Libel & Slander* (8th Ed). Now let us examine the article complained of in the present case. The headline of the article glaringly indicated that the article was about British diploma mills stepping up their sales racket in Malaysia. The gist of the article is that

A certain organizations based in England were advertising actively in Malaysia to sell their bogus qualifications for a fee of £1,200 or more and they placed advertisement overseas 'to mislead students who are not familiar with the genuine British educational institutions'. Having said all these the author, DW1, then went on to draw the attention of the readers of the *New Straits Times* to an advertisement in the local papers placed by ICM which B was offering a diploma in business studies course through a local educational institution. He alleged that ICM was actually registered in Ireland with postal boxes in England — an allegation which, as can be seen later, is not entirely true. He then went on to allege that ICM had 'no standing and no status whatsoever with the United Kingdom Examination Board' — C an allegation which, again as can be seen later, is totally false. To my mind, any ordinary reasonable person who reads the article would most certainly link ICM with one of those organizations which operated the 'diploma mills' racket. More importantly, it would certainly strike such a person that by placing the advertisement in the local papers ICM was trying to mislead our students in offering them a worthless qualification for a fee. Under the D circumstances, I have no doubt whatsoever that the article sets out as clearly as possible that ICM was one of those organizations referred to in the article.

The second point to consider is whether the article is defamatory. Having arrived at the conclusion that ICM was linked by the author of the E article to other English organizations which operated 'diploma mills' to sell their bogus qualification, the inevitable conclusion which any ordinary reasonable reader of the article could only arrive at is that the article is certainly defamatory of the plaintiffs. Bearing in mind that the law of defamation is basically to protect a person's or a body of persons' reputation, it certainly cannot be gainsaid that the imputations as set out in the F offending article can only be regarded as having a strong tendency 'to lower the plaintiffs in the estimation of right thinking members of society generally or the parents of potential students or the potential students themselves who were at the material time considering whether to apply for admission to ICM particularly'. In addition, the article is intended to expose ICM to G 'hatred, contempt or ridicule'. It does not matter whether or not what have been said in the article are believed by those to whom it is published — see *Hough v London Express*[7] at p 515.

Second issue — justification

H The facts relied upon by the defendants in their defence of justification are these:

(i) the plaintiff is incorporated in Ireland;
(ii) the plaintiff's qualifications conferred by the plaintiff is not sufficient to gain entry into the following institutions of higher learning and they I named some 34 such institutions which are mainly universities in various cities in England, Wales and Scotland.

Now there is no doubt that when a plaintiff has proved the publication of defamatory words, he has established a prima facie cause of action. It is no

part of the plaintiff's case in an action of defamation to prove that the defamatory words are false for the law presumes in his favour. It is, however, a complete defence to an action of libel and slander that the defamatory imputation is true. The defendant must prove the truth of the very imputation complained of. At common law, under a plea of justification the defendant must prove the truth of *all* the *material* statements in the libel — there must be substantial justification of the whole libel. However s 8 of the Defamation Act 1957 has rendered the common law rule less strict and the said s 8 reads:

> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

Even where the charges are not severable, the defendant may make out the truth of so much of the libel as he can and though he will be liable in damages for any statements which add to the sting of the libel and which he has not proved true, he can still rely on his partial justification in mitigation of damages (see *Plato Films v Speidel*[8] at p 1141).

From the evidence, there is no doubt firstly, that ICM is registered in the Republic of Ireland. But ICM is also registered in the UK as a foreign company. Counsel for the defendants in his submission, contended that the plaintiffs' claim of having been registered in the UK was misleading in that if plaintiffs were to be an English registered company, the plaintiffs would not be allowed to use the title 'Institute'. Their claim of being registered in UK was therefore misleading and their status as a foreign company is a ruse to enable them to use the title 'Institute'. Pausing here for a moment to make an observation of counsel's contentions, I cannot appreciate the significance of his submission on the matter of registration of ICM. The article clearly says that ICM was registered in Ireland and conveniently omitted to say that ICM was also registered in England albeit as a foreign company. By this omission, it is clear to my mind that the author of the article was at the material time trying to emphasize in his article when read as a whole, that ICM had no standing whatsoever in England. There is equally no doubt in my mind that the author had succeeded in creating doubts in the mind of an ordinary reasonable reader of the article regarding the authenticity of ICM as an educational institution and the authenticity of any degree conferred by ICM. The issue of registration therefore gives additional strength to the imputations made against the plaintiffs in the article. Furthermore, in alleging that not only was ICM registered in the Republic of Ireland, the article also stated that ICM had only postal boxes in England. To my mind, any ordinary reasonable reader of the article would certainly be led to believe that ICM has no premises or any office in England let alone a school from which they could operate as a proper educational institution. Such an imputation is certainly false — ICM's headquarters were and still are located in Bournemouth where they have a Business Studies Centre opened since 1980 where students can do full-time studies of the various courses as provided in the ICM programme (see the

information sheet on ICM prepared by the British Council reproduced from pp 72–75 of bundle SNAB ('the information sheet') and the evidence of PW1 and PW3). A photograph of the ICM building was also tendered as exh P18.

As regards to the defendants' contention that the qualifications conferred by the plaintiffs are not sufficient to gain entry into some 34 educational institutions, even if it is true, such a contention per se does not warrant the imputation that ICM is a diploma mill and/or a bogus educational institution. I say so for two reasons. Firstly, the information sheet clearly states that ICM is a professional examining body and offers a number of vocational qualifications in the fields of business studies and commercial management; furthermore, it is stated that full and part-time tuition leading to ICM examinations is offered by various schools and colleges both in the UK and overseas. It is also stated that though the Business Studies Centre of ICM is not accredited to the British Accreditation Council for Independent School, nevertheless, it is accredited to the Association for the Recognition of Business Schools. Secondly, and more importantly, the ICM qualifications are recognized by a number of senior professional examination boards for subject exemption purposes or for entry purposes and students with ICM qualifications are also accepted for advanced standing credits in Open University business degree courses. The information sheet also states that various educational institutions are known to accept ICM qualifications for entry to courses of such institutions. In formulating the information sheet, the British Council officials had made enquiries with some 46 institutions of higher education and only eight of such institutions responded quite categorically that ICM qualifications were not acceptable for gaining admission to the said institutions while at least eight of the said institutions responded that they would give consideration to ICM qualifications for entry purpose or that the Diploma in Commercial Management of ICM might even be considered as entrance qualification for appropriate postgraduate qualifications. The remaining institutions responded that they either had no experience of ICM qualifications or that they did not offer any courses in business or management studies area and for this reason they would not therefore accept ICM qualifications for admission (see for example University of Leicester). Prospective students however are advised that a response from any such institution of 'no experience of the qualifications' does not necessarily imply that a student would not be considered for entry, but indicates that no previous application for entry has been made by a student holding one or more of the ICM awards. More importantly, the information sheet clearly states:

> ICM qualifications are recognized by a number of senior professional examining bodies boards for subject exemption purposes or entry and also qualify for advanced standing credits with Open University business degree courses and for transfer credits with a number of American universities.

Following this statement, it is also stated that ICM awards are recognized by some 11 other professional examining bodies including examining bodies like the Institute Administrative Management, Chartered Insurance Institute and Institute of Bankers.The recognition of ICM qualifications by

these three examining bodies as stated in the information sheet corroborates the assertions of PW1 as encapsulated in his evidence. Letters from the Chartered Insurance Institute dated 10 March 1981 and the Institute of Administrative Management dated 8 October 1982 were produced at the trial to confirm the assertions made by PW1 (see the letters in pp 1 and 2 of bundle NAB). Counsel for the defendants suggested in his submission that the evidence of Mr Keith Thomas Robert Davies, the British Council officer (PW3) who produced and tendered the information sheet and who also gave evidence, among other things, on the formulation and contents of the information sheet, could not be said to be beyond reproach. It is to be noted that counsel did not say (to my mind he is right not to say so) that little or no weight should be given to the testimony of PW3 or that his credibility is questionable. Counsel merely pointed out that: (1) there was an important inconsistency in his evidence; (ii) that PW3 took no part in compiling the information sheet; and (iii) in any event PW3 had only served in Malaysia for about five months although he did earlier serve in Malaysia from June–August 1988. Since he was not around in 1985 nor was he involved in the British Council survey which resulted in the publication of the information sheet in 1988, PW3's evidence about the contents of the information sheet was at its best speculative. Hence, PW3's evidence should be disregarded. With due respect, counsel's suggestion is to my mind simply ludicruous. I am fully satisfied that the quality of PW3's evidence is beyond criticism — he said what he personally knew about the compilation and the contents of the information sheet although on a few occasions he did give his opinion on certain matters. The so-called inconsistency relied on by counsel for the defendants arose from what he said in the examination-in-chief about the authenticity of ICM diplomas and what he later said in cross-examination. Thus in examination-in-chief he said:

> As far as I am aware I have not heard of ICM selling bogus diplomas. I have not received any complaints from the public that ICM sold bogus diplomas. I have not received any complaint from the public that ICM is a bogus institution.

These statements of PW3 show that he has no doubt that ICM is not a bogus educational institution which sells bogus diplomas. This proposition is reinformed by what he said later, viz:

> British Council would make *factual* statements. If ICM is a bogus institution or selling diplomas that fact would appear in the information sheet SNAP pp 72–75. (Emphasis added.)

However, counsel drew my attention to the following statements made by PW3 at the close of the cross-examination of this witness in answer to a question posed by counsel for the defendants:

> Q: Why do you say partially as a result of the article?
> A: The survey was done not entirely as a result of this article. There were some enquiries about the status of ICM qualification. I am aware of those inquiries at various times in the last five years. There are some letters concerning enquiries about ICM qualifications within the last three years. But I do not know whether there were such letters *earlier*. We do not point in our

information that this is a bogus institute as such *but from the information one could imply the institute is a bogus one that is to say it is really bogus.* (Emphasis added.)

Based on the last three lines from the answer of PW3 to the question posed by counsel, it is therefore contended by counsel (if I understand him correctly) that the British Council had gathered sufficient information from which an implication could be drawn that ICM was really a bogus educational institution. On a casual glance of the words used by PW3, the contention of counsel cannot be said to be frivolous. Be that as it may, upon a careful scrutiny of the aforesaid answer of PW3, it is to be noted that firstly, PW3's answer was given when he was being cross-examined at the continued hearing of this case held on *6 November 1990.* That being the case, it cannot be disputed that enquiries made by letters or by other means about ICM qualifications to the British Council could only *commence* from November 1985 and the enquiries continued to be made at various times *thereafter.* Bearing in mind that the article complained of was published by the defendants on 29 April 1985, it is obvious that it was the said article that triggered off the making of the enquiries. Secondly, when PW3 said 'but from the information one could only imply the institute is a bogus one that is to say it is really bogus', this court has not been advised as to: (i) the source of the information; (ii) the time when the information was gathered; and (iii) the nature of the information. However, reading the said answer of PW3 in the light of the evidence of PW3 as a whole (which one must so read as it would be incorrect to read the said answer in isolation), any attempt to find an answer to the three points raised by me would inevitably be based on conjecture and speculation. It is a pity that counsel for the defendants did not go one step further to seek clarification from PW3 on these three points. However, without indulging into the field of conjecture, I can certainly say without fear of contradiction that: (i) the source of information is from some of the enquiries made after the said article was published; and (ii) the information received from such source was not and could not be the basis on which the information sheet was published — the information relied by the British Council to compile and formulate the information sheet was solely derived from the information gathered by their officials in the course of their investigation into the affairs of ICM. It is from this 'official' information gathered by the investigation team of the British Council that laid the foundation on which the information sheet was published to (and I quote) 'offer factual information if we have it available'. Indeed, PW3 in his examination-in-chief has no hesitation in saying (and I quote):

(i) my information sheet is an independent information sheet;
(ii) the public can rely on the information sheet; and
(iii) if ICM is a bogus institution or selling diplomas that facts *would appear* in the information sheet.

In the ultimate analysis, I have no hesitation in accepting the contents of the information sheet as representing the correct factual information regarding the affairs of ICM. There is no mention indeed not even a hint, in the

information sheet that ICM was and is a bogus institution which was and is in any way involved in the 'diploma mills' as alleged in the article. To reinforce this proposition, Mr Lyndon Jones (DW1) the author of the said article said categorically that: 'I did not at any time inform the Tunku that the Institute of Commercial Management was a diploma mill' and 'I did not any time say that ICM sold their diplomas for £1,200.' He asserted that the diploma mills which he was talking about in the article was in respect of the two degree mills namely the Sussex College of Technology and the Somerset University. More importantly, the gist of his evidence is nothing more than to allege that ICM had exaggerated the quality of their qualifications and also their status as a senior British professional body and not that ICM was or is a bogus educational institution which participated in the 'diploma mills' racket. Be it noted that Tharampal Singh, PW2, who is now a Financial and Administration Executive with Medialatex Sdn Bhd confirmed in his evidence that he was a student with ICM from January 1987–1989. He was granted a partial grant in aid of students by ICM to pursue a course leading to a Diploma of Business Study in 1986. However, before proceeding to England to pursue the course with ICM, he made enquiries as regard to whether the ICM qualifications would be recognized in Malaysia. He was then shown the article complained of and after reading the article he had a great deal of misgivings as to the qualifications of ICM. Nevertheless, he took up the offer and proceeded to the Business Study Centre, Bournemouth, the headquarters of ICM where he met over 100 students doing the various courses offered by ICM. The course pursued by PW2 was as testified by him a full-time course. He was taught by experienced tutors and at the end of the course he sat for an external examination. After graduating, he stayed on to pursue the Diploma in Commercial Management course offered by ICM and subsequently, he also went on to do the Advance International Management course in ICM. Before doing the last mentioned course, he was offered a place by the University of Strathclyde to pursue a two-year study for a Master in Business Administration. He had to turn down the offer as he could not afford the fees of £5,000pa. However, according to him, his younger brother, Sudjeet Pal Singh after graduating from ICM was able to secure a place in and was admitted to the University of Surrey, Guildford. PW2 returned to Malaysia after having obtained the three diplomas from ICM. With the ICM qualifications, he got his present job with Medialatex Sdn Bhd which is quite a substantial corporation of which he was placed on the management level.

A B C D E F G

Now, counsel for the defendants in his submission, urged me to reject the evidence of PW2 in toto on the ground that he had failed to produce certain documents. It is to be noted that at the end of the cross-examination of PW2, counsel for the defendants informed this court that:

H

> Subject to the following documents which witness said he may or may not be able to produce I have no further question. Upon production of the documents I may have to cross-examine him on these documents.

I

Counsel then listed the documents in question. These documents were not produced and hence, counsel in his submission, said that he was invoking s 114(g) of the Evidence Act 1950 to sustain his contention that the

A evidence of PW2 should be discarded in toto. I cannot agree because in the first place, PW2 was asked to produce among other things, the advertisement which he saw that made him apply for the grant-in-aid and the relevant correspondence exchanged between him and ICM and/or the Business Studies Centre. Now, PW2 has clearly stated in his evidence that he would produce these documents if he could still find them. He also said in cross-examination as well as in re-examination that he had thrown away many documents which he felt would no longer serve any purpose before he returned to Malaysia.I think it is not unreasonable to assume that among the documents he threw away would be those comprising the correspondence between him and ICM and/or the Business Studies Centre prior to his gaining admission to ICM which would no longer be of use to him upon his return to Malaysia. In the second place, at the close of the plaintiffs' case, counsel for the defendants did not raise the question of the non-production of the documents in particular the MCE, LCCI certificates and the three diplomas from ICM. I am not suggesting that counsel for the defendants must raise this question at that stage failing which he must be precluded from raising the issue in his submission. But the fact that no such question was raised at that stage and even upon the close of the case for the defendants, is a factor which I cannot ignore since to my mind, if the non-production of the documents is to be an issue for the case of the defendants it would only be reasonable for counsel for the defendants to remind this court in the course of the trial of the non-production of the documents so as to enable the defendants to either produce the documents or to explain if necessary why they could not produce the same. I have no doubt that at the close of the case, the matter concerning the production of the documents had been overlooked by everyone. Indeed, even I at the material time, had overlooked this matter. However that may be, the more significant points that I have taken into consideration are: (i) the evidence of PW2 has not even been dented let alone broken down in cross-examination; (ii) the credibility of PW2 has in no way been tarnished and; (iii) the quality of his evidence is to my mind beyond any serious reproach; he gave his evidence in a remarkable simple and straightforward manner without any major inconsistencies and he gave a detailed account of all that he had done while he was a student of ICM. For the above reasons, I have no doubt at all that PW2 is a witness of the truth. In any case, what he said are merely corroborative of the other evidence adduced by the plaintiff (see for example the evidence of PW3). More importantly, PW2's evidence is to a certain extent supported by the documentory evidence relied on by the defendants and also by the evidence of DW1 who, as I have said earlier, claimed that he was not alleging that ICM was a bogus institution which was involved in the diploma mills racket. Having dealt with the evidence adduced by the plaintiffs, let us now examine the evidence in support of the case for the defendants. It may be recalled that in their re-amended statement of defence, the defendants in raising the defence of justification averred that the plaintiffs' qualifications are not sufficient to gain entry into the institutions of higher learning and they listed out the names of 23 universities and other institutions of higher education in Britain where the qualifications of ICM were not acceptable to gain admission to these 34 universities and

institutions. From the oral evidence of DW1, he admitted that he wrote the letter shown in p 58 of SDNBD. It was a letter from The Association of Business Executives ('ABE') dated 8 October 1984. DW1 admitted that after he had written the said letter and apparently had it typed, he got one Mr TK Cropper, the then Secretary General of ABE, to sign it. The letter was marked private and confidential and it reads:

> For some years through our journal Education and Training and other media this association has been campaigning against degree mills and bodies making spurious claims regarding their qualifications. Please see enclosed.
>
> Last week we were shown an advertisement, copy of which we attach, issued by a body calling itself the Institute of Commercial Management.We enclose a copy of the document of registration — note it is registered in Ireland — and a copy of the last balance sheet available from Companies House.
>
> In a leaflet issued by this Institute it states:
>
> The Diploma in Business Studies is an equivalent pass degree standard award and is accepted for exemption purposes by other senior professional bodies, such as the Institute of Bankers. Suitably qualified and experienced students will also find that the *diploma can be used by them to gain entry into universities, polytechnics and colleges of higher education, for first degree and certain postgraduate courses such as the DMS.*
>
> May I enquire whether you have any knowledge of this body? If so, does the university accord it any recognition and have students been accepted to degree courses on the basis of having obtained one of its diplomas?
>
> Before concluding may I enquire whether you have any material on degree mills and, if so, may I have sight of it. We are pressing vigorously to secure legislation to put an end to this academic fraud.

This letter was addressed to 47 universities and institutions of higher education in Britain. These 47 universities include all the universities mentioned in the re-amended statement of defence and in addition 13 other universities (eg the Universities of Aberdeen, Glasgow, Hull, Leeds, Leicester, Nottingham and other institutions of higher education not named in the re-amended statement of defence) were also recipients of the aforementioned letter of ABE. The replies from almost all these universities and institutions indicated either they had no knowledge or that they had no information of ICM or that so far, no graduates of ICM had applied to them for admission. For example, the reply from University of Oxford says that they have 'made extensive enquiries here and at our Management Studies Centre and have no experience of the problem to which you refer in your letter of 8 October'; the reply from University of Cambridge reads, 'no knowledge in Cambridge of the Institute of Commercial Management'; the reply from University of Manchester reads, 'have made enquiries of such colleges who might have encountered the diploma concerned in the course of checking upon applicants' qualifications, but none of them have encountered it' and they went on to say that, 'the only case (of diploma mill) with which we are acquainted — University of Coventry'. Examples of non-committal reply is that from the University of Highfield of Southampton which says: 'we do have some knowledge of the Institute (ICM) and would not wish to say that we would never accept a student offering a Diploma of the Institute in, say part satisfaction of our normal requirement

A although we have not yet done so', the reply from the University of East Anglia which says, 'I have no knowledge of the body itself and regret that I am therefore unable to help you in your quest for information'. Only three of the universities were positive about non-acceptance of the ICM qualifications, namely, The City University, University of Surrey and University of London. The only reply that is most damaging to the plaintiffs is that from the University of London which says: 'I would be extremely surprised if any university in the UK has given it (ICM) any recognition ...' and the writer went on to say that they wrote to Koperasi Jayadiri Malaysia Bhd to explain that they do not give any consideration to the qualifications awarded by 'this body'.

C From the above discussions, it cannot be disputed that the defendants have managed to establish that only a very small fraction of educational institutions in Great Britain has categorically refused to accept the qualifications of ICM as sufficient to gain entry into their institutions and what is more important is that none of the educational institutions averred in the re-amended statement of defence can be included in this very small fraction. On the other hand, the majority of the educational institutions (of which all the universities and institutions of higher education mentioned in para 6 of the re-amended statement of defence formed part of) are not prepared to commit themselves one way or the other as they either had no information of ICM or that there was no occasion where graduates of ICM had applied to them for admission. Even if one is prepared to construe such non-committal stand taken by the majority in favour of the case for the defendants, the most that could be said for the defendants would be that they might have succeeded in sowing that there is a possibility that the ICM qualifications might well be (not would be) insufficient to gain entry into the majority of the educational institutions. Such a 'possibility' is not sufficient in law for this court to hold that the defendants have succeeded, on the balance of probabilities, in establishing that the qualifications of ICM are not sufficient to gain entry into the educational bodies mentioned in para 6 of their re-amended statement of defence and/or other educational bodies. Thus in the case of *Abdul Rahman Talib v Seenivasagam & Anor*,[9] Barakbah CJ (Malaya) said at p 77:

> The most important of the documentary and other evidence on which the first defendant relied was the second defendant's statement as set out in App 'A'. *It was conceded by all parties that, in order to justify, the first and second defendants had to discharge the onus of establishing substantially the truth of the words contained therein.* In the opinion of the trial judge the defendants had succeeded in justifying by proving as substantially true the whole of the words contained in App 'A', with the exception of para 18 relating to the payment of cash to the plaintiff.
>
> There were two main charges against the plaintiff, one being the receipt of two sums of money and the other being receipt of favours. The learned judge had found that he did receive favours, but not money, and he came to the conclusion that, although the defendants had failed to prove the truth of the charge relating to the money, the imputation in that respect did not materially injure the plaintiff's reputation, having regard to the truth of the rest of the charges. (Emphasis added.)

I shall now turn to the allegation in the article 'ICM had no standing and no status whatsoever with the United Kingdom Examination Board'. From the evidence adduced, there is as stated earlier, no doubt that this allegation is totally untrue. In the first place, there was and still is no board known as the United Kingdom Examination Board. Secondly, the ICM qualifications were and still are recognized by a number of senior professional examining boards and in the information sheet, the British Council had listed some 11 such examining boards which recognized the ICM qualifications. It follows therefore in failing to justify this very defamatory imputation the defendants as well as author of the article were indeed acting maliciously in their attempt to discredit the standing and status of ICM and to equate the latter as one of the institutions that operated the diploma mills racket.

To complete my finding as regard to the defence of justification it may be recalled that DW1, the author of the article complained of, in his evidence asserted, that he was concerned about the way in which the plaintiffs exaggerated the quality of ICM qualifications and not that the plaintiffs were a bogus educational mill. He wrote the article in order to caution students who intended to gain entry into the plaintiffs' institution to scrutinize with care the quality of ICM qualifications. That might well be his motive or intention in writing the article. But the law is not concerned with the motive or intention of the author of the said article. What the law is and should be concerned with is the tendency and consequences of the publication which in the present case are clearly defamatory of the plaintiffs in that imputations of operating a diploma mill to sell ICM qualifications were made against them. The motive or intention is only relevant when a case falls within the ambit of s 7 of the Defamation Act 1957 (to which the presence case is not one of such cases). Motive and intention is also relevant to negate actual malice (see *Slim v Daily Telegraph Ltd*[6] at p 173). The question of actual malice will be dealt with presently. Suffice it to state at this juncture that on the evidence adduced at the trial, the plaintiffs have satisfied me that the author and/or the defendants had at the material time acted maliciously in making and publishing the article complained of.

From the above discussions, I have no hesitation at all in holding that the defence of justification relied on by the defendants is wholly without any merits.

Third issue — fair comment

There is no doubt that it is a defence to an action of libel that the words complained of are fair comment on a matter of public interest. The scope of the defence of fair comment is well-illustrated by the following observation of Fletcher Moulton LJ in *Hunt v Star Newspaper Co Ltd*:[10]

> The law as to fair comment, so far as is material to the present case, stands as follows: *In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment:* see *Andrews v Chapman.* The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it

might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses. In this relation I must express my disagreement with the view apparently taken by the Court of Queen's Bench in Ireland in the case of *Lefroy v Burnside*, where the imputation was that the plaintiffs dishonestly and corruptly supplied to a newspaper certain information. The court treated the qualifications 'dishonestly' or 'corruptly' as clearly comment. In my opinion they are not comment, but constitute allegations of fact. It would have startled a pleader of the old school if he had been told that, in alleging that the defendant 'fraudulently represented', he was probably making the most important allegation of fact in the whole case. *Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment. In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails.* This has been so frequently laid down authoritatively that I do not need to dwell further upon it: see, for instance, the direction given by Kennedy J to the injury in *Joynt v Cycle Trade Publishing Co*, which has been frequently approved of by the courts.

Finally, comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation. (Emphasis added.)

The observation of Fletcher Moulton LJ was cited and explained by Lord Porter in *Kemsley v Foot & Ors*[11] at pp 506–507. From the above observation, it can be seen that to succeed in a defence of fair comment, the defendant must prove:

(i) the words are comment and not a statement of facts;
(ii) there is a basis of facts which are substantially true or which the comment is made;
(iii) the comment is on matter of public interest; and
(iv) the comment is made honestly and without malice.

I should also bear in mind that the vigour of the common law rule governing a defence of fair comment has been depreciated by s 9 of the Defamation Act 1957 which reads:

> In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

Now counsel for the defendants suggested, inter alia, in his submission that 'clearly thus, as with all other claims of the plaintiff amount to extravagant and disproportionate exaggerations of the quality of the plaintiff and its qualifications. As such, the comments published by the defendant on this background must certainly have been fair comments on a matter of public interest'. Counsel then went on to say: 'The defendant contend(s) that the

meaning to be ascribed to the words is that the plaintiff's qualification must be viewed with care and caution'. He then cited a passage from the judgment of Lord Denning in *Slim v Daily Telegraph*[6] where his Lordship said, inter alia, that: 'His [the defendant] is the cardinal test' when the court is asked to decide whether the defence of fair comment can be sustained. However, counsel failed to take note of the following important words of Lord Denning appearing in the same page of the *Slim* case:[6] 'The writer *must get his facts right*; and he must honestly state his real opinion'. (Emphasis added.)

The defence of fair comment has been in any case succinctly stated per judgment of Viscount Finlay in *Sutherland v Stopes*[12] at p 62:

> The defence of fair comment on matters of public interest is totally different. *The defendant who raises this defence does not take upon himself the burden of showing that the comments are true. If the facts are truly stated with regard to a matter of public interest, the defendant will succeed in his defence to an action of libel if the jury are satisfied that the comments are fairly and honestly made.* To raise this defence there must, of course, be a basis of fact on which the comment is made.
>
> For a good many years past a practice has prevailed of raising this defence by what has been called the 'rolled up plea', but it will be found that this term is a misnomer based on a misconception of the nature of the plea. Such a plea states that the allegations of fact in the libel are true, that they are of public interest, and that the comments upon them contained in the libel were fair. The allegation of truth is confined to the facts averred and the averment as to the comment is not that they are true but only that they were made in good faith, and that they are fair and not exceed the proper standard of comment upon such matters.
>
> There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one, but it in fact raises only one defence, that being the defence of fair comment on matters of public interest. *The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment.* This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct. (Emphasis added.)

From the aforesaid judgment of Viscount Finlay, the elements of fair comments have been stated more explicitly and they are as follows: (i) to raise the defence of fair comment there must be a basis of fact on which the comment is made; (ii) the averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment; and (iii) the defence of fair comment must fail if the libel is malicious or that it exceeded the bounds of fair comment. Another point to be noted regarding the plea of fair comment is illustrated in *Kemsley v Foot & Ors*[11] at p 505:

> Sometimes, however, he says, it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful', this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. *But if he asserts that*

A *the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact.* But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those
B facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact. (Emphasis added.)

C Transposing the principles as distilled from the cases cited above regarding the scope of fair comment, I have no hesitation in holding that the article complained of comprised of: (i) bare statements of fact; or (ii) the said statements contained in the article are capable of being considered as bare statements of fact. None of the said statements can be classified as comments. I have arrived at this conclusion after a careful analysis of the
D relevant statements appearing in the article complained of, the result of which is as follows:

(a) in para 1 of the said article the author stated as a fact that British diploma mills were advertising actively in Malaysia to sell bogus qualification;
E (b) in para 2 he went on to say as a fact that these 'diploma mills sell all sorts of qualifications for a fee of £1,200 or more';
(c) in para 6 he continued to state as fact that 'the organizations selling the dubious certificates advertised overseas to mislead students ...';
(d) in para 7 he drew the attention of readers to an advertisement in the local papers by ICM 'which was offering a diploma in business studies
F course ...';
(e) in para 8 he stated as a fact that 'this institute is actually registered in Dublin Southern Ireland with only postal boxes in England'; and
(f) finally in the last paragraph he concluded his statement of fact that '(ICM) had no standing and no status whatsoever with the United
G Kingdom Examination Board'.

No ordinary reasonable reader of the said article could construe any of the abovementioned statements as an expression of comment or opinion of the author. At one stage I thought that by using the phrase 'diploma mills' it might be said that the author was in fact expressing his opinion about
H certain British education organizations operating as diploma mills to sell their qualifications. Upon reading the phrase 'diploma mills' within the context of the said article, I am not satisfied that the use of the phrase 'diploma mills' could be equated as an expression of the author's opinion. He was merely coining the phrase 'diploma mills' to describe the organizations who participated in selling their dubious qualification for a fee. In the
I circumstances, the defence of fair comment cannot be sustained. Thus, in *Turner v Metro-Goldwyn Mayer Pictures Ltd*[13] Lord Porter said at p 461:

> If the communication were a statement of facts and the facts were untrue, a plea of fair comment would not avail and it is for the jury in a proper case to

determine what is comment and what is fact, but a pre-requisite to their right is that the words are capable of being a statement of a fact or facts.

The above observation of Lord Porter was cited by Edmund Davies LJ in *London Artists Ltd v Littler*[14] at p 394 to support his view that: 'If the judge takes the view that they amount clearly to assertions of fact alone, no question of fair comment arises ...' (see p 395).

Even assuming that the assertions of the author in paras 1, 2 and 6 of the said article amount to expressions of his comments on the subject of diploma mills, nevertheless, the defence of fair comment of the defendants must fail simply because in trying to assert that ICM was one of the organizations operating diploma mills, the author based his purported comment on facts that turned out to be not true, namely, that the plaintiffs were only registered in Dublin with only postal boxes in England and that ICM had no standing and no status whatsoever with the United Kingdom Examination Board. More importantly, the plaintiffs as can be seen later, have succeeded in establishing actual malice on the part of the author of the said article as well as the defendants. That being the case, the defence of fair comment must fail.

Malice in fact

As stated by the author of *Gatley on Libel and Slander* (8th Ed) para 772: 'The relationship of abuse of privilege, prejudice, recklessness and belief to malice in cases of qualified privilege has now been reviewed in the House of Lords', and the authors referred to the case of *Horrocks v Lowe*.[15] The author gave a useful summary of, inter alia, the principles of law laid down in the speech of Lord Diplock governing express malice which would, if proved, demolish the defence of fair comment. In p 337 para 773(2) of *Gatley* it is stated:

Absence of honest belief.

(a) If it can be proved that the defendant did not believe that what he published was true, that is generally conclusive evidence of express malice. The burden of proof, at least where conduct extraneous to the privileged occasion is not relied on, is not a light one.
(b) If the defendant publishes untrue matter, without considering or caring whether it be true or not, he is treated as if he knew it to be false, but carelessness, impulsiveness or irrationality in arriving at a belief is not to be equated with indifference to truth.
(c) There are exceptional cases where a person may be under a duty to pass on defamatory reports made by another which he does not believe to be true: he is not then malicious.

In the present case, the defendants are relying on the fact that the author of the article honestly believed that what he said in the article were true. Another point raised by the defendants is that even assuming that the author knew the statements stated in the article were false, his knowledge of the falsity only goes to show express malice on the part of the author himself and not on the part of the defendants. On the other hand, the plaintiffs suggested that the said author clearly knew that the statements

appearing in the article were false or that he had no genuine belief in their truth and the conduct of the defendants also clearly showed that they acted recklessly in failing to carry out any or any proper inquiries of the plaintiffs before publishing the said article.

From the evidence adduced, I have no doubt at all that:

(a) the author of the said article who in his evidence described himself as a man of vast experience in the field of education in England, must have known or ought to know that there is no board in the United Kingdom known as the United Kingdom Examinations Board yet he deliberately mentioned this fictitious board to support the imputation that ICM had no standing and no status. Bearing in mind that such an imputation read within the context of the article would without doubt lead any ordinary reasonable reader to believe that ICM was in fact a diploma mill involved in the selling of their qualifications the use of such false statement surely cannot suggest anything except that the author acted maliciously.;

(b) likewise, in deliberately describing that ICM was registered in Dublin, South Ireland and conveniently omitted to state that ICM was also registered in UK and again deliberately stating that ICM only used postal boxes in UK without mentioning that ICM had a Business Studies Centre in Bournemouth, it is clear that again the author acted dishonestly. He was fully aware that the two statements were not true and he deliberately used these lies to suggest to the readers of the article that ICM was not a genuine educational institution; and

(c) at the material time ABE, to which the author of the article was the chairman, was competing with ICM to attract Malaysian students to join the first mentioned institution and more importantly one of the local educational institutions namely TL School of Management located in Kuala Lumpur with a branch in Petaling Jaya which since 1981 had been enrolling local students for and on behalf of ABE decided to switch to enrolling local students for and on behalf of ICM in 1983 resulting in ABE losing out some 200 students for that year (this was admitted by DW1, the chairman of ABE and the author of the said article — see notes of evidence p 97 para B). There is no doubt that as a result of this switch the author of the said article was in Penang on 29 April 1985 to recruit Perkim-Goon students for enrolment with ABE. It was also on the same day that he made the said article which the defendant published in the issue of the *New Straits Times* dated the same day. There is no doubt that the said author deliberately made the highly damaging imputations in the article against ICM if not to get more local students to join ABE at least to establish albeit falsely that ABE qualifications were genuine as opposed to ICM qualifications which were bogus. Such imputation could no doubt enhance the image of ABE while at the same time destroy the image of ICM. The attitude of the author of the said article at the material time can only be described as hostile and it is this hostile attitude that motivated the author to write the said article. This being the case it surely cannot be said he acted bona fide when he wrote the article.

As to the defendants themselves, it is to be noted that in reply to an enquiry made by a student reader to them, they had published in their newspaper dated 30 July 1983 an article ('the 1983 article') which clearly shows that the defendants through their agent or agents had taken action to refer the enquiry of the said student reader to the Educational Information Resources Centre of the British Council ('the British Council') in order to get an answer to the enquiry concerning the genuiness of ICM qualification. The defendants through their agent or agents had been given an assurance by the British Council that: 'The Berkshire Institute of Commercial Management is a well-known professional body established in 1979. The partial grant offer is genuine.'

Now, counsel for the defendants in his submission, urged me to totally ignore the contents of the 1983 article on the ground that since neither the said student reader who made the enquiry nor the officer of the British Council who gave the assurance was called to testify, the 1983 article was inadmissible on ground of hearsay. I cannot agree with counsel's contention simply because the object of tendering the article as evidence is not, I repeat not, to establish the truth of what were said in the 1983 article but the fact that the 1983 article comprising of the nature of the enquiry by the student reader and the assurance of the British Council was published. If an authority is necessary, I would refer to the leading case of *Subramaniam v PP*[16] where the Privy Council said at p 60:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. *It is not hearsay and is admissible when it is proposed to establish not the truth of the statement but the fact that it was made.* The fact that the statement was made, quite apart from its truth, *is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.* (Emphasis added.)

In the present case, it cannot be disputed that the assurance of the British Council published in the 1983 article was given to the defendants through their authorized agent or agents (whoever he or they might be) some one year nine months prior to the publication of the article complained of on 29 April 1985. It may well be true that if one were to construe the observation of the Privy Council cited above in its narrow sense, the defendants' agent or agents to whom the assurance was given should be called before it could be admissible. However, I think the said observation of the Privy Council should in the circumstance of this case be construed in its wider sense because the defendants here are a corporation registered under the Companies Act 1965 and as such, the defendants could not act by themselves; they could only act through their officers, servants or agents. Hence, any information given to the defendants' officers, servant or agents must be deemed to be information given to the defendants themselves. Since the assurance given by British Council and published in the 1983 article was in fact given to the defendants themselves and it is up to them to adduce evidence in rebuttal or at least explain how did they acquire the assurance from the British Council. Another important point is that the object of tendering the

said assurance in the 1983 article as evidence is clearly to show the mental state and conduct of the defendants agent or agents who caused the article complained of to be published on 29 April 1985. Or, putting it another way, the object of tendering the said assurance as evidence is to establish whether or not the defendants through their agents had acted recklessly or with indifference as to the truth or falsehood of what was published in the article complained of on 29 April 1985 or whether they had acted honestly or otherwise. For these reasons, I hold that the assurance of the British Council as published in the 1983 article is admissible.

Having received the aforesaid assurance from the British Council some one year and nine months prior to the publication of the article complained of, I have no doubt that any belief that the imputations appearing in the article complained of were true could only be induced by the defendants through their agent or agents by shutting their eyes to all the facts which fell in the opposite direction and such a belief is not an honest belief; it is no belief at all (see *Clark v Moly News.*[17]) To reinforce this proposition, it is relevant to cite the following comment made by the author of *Gatley on Libel and Slander* (8th Ed) para 778:

> So where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown that the imputation was groundless, or where he deliberately stopped short in his inquiries in order not to ascertained the truth, a jury may rightly infer malice.

Transposing the aforesaid principles of law to the present case, I do not have the slightest doubt that the defendants deliberately or at least recklessly abstained from availing themselves of means of information which lay at hand when the slightest inquiry would have shown that the imputation appearing in the article complained of were groundless.

For the above reasons, the plaintiffs have succeeded in proving express malice on the part of the author of the article complained of as well as on the part of the defendants.

Expressions of caution and care

In raising the defence of fair comment, the defendants gave the following particulars in their re-amended statement of defence to sustain the said defence:

(i) that the plaintiffs are not registered in the United Kingdom but in the Republic of Ireland;
(ii) that the plaintiffs are not accredited with the United Kingdom Examinations Board; and
(iii) that the diploma and other qualifications offered by the plaintiffs were not accepted as entry qualification by institutions of higher education which institutions are listed in para 6 of the statement of defence.

In response to the plaintiffs' request for further and better particulars on all the facts upon which the comment is based, the defendants furnished the following facts:

(1) the report contained in a report of an institution providing degrees as well as providing opportunities for further advancement of education at university after obtaining qualifications through the plaintiffs' institution;
(2) the report interests Malaysian students intending to pursue studies overseas particularly in the United Kingdom; and
(3) the report provided caution and concern that unauthorized institutions provided educational courses which they claim had the recognition of various institutes of higher learning but in fact did not have such recognition.

On the fact itemized as (3) in the further and better particulars, counsel for the defendants in his submission contended that as the author of the said article is a man of vast experience in the field of education in England as well as in Malaysia and as he was asked by the late Tunku Abdul Rahman to comment on the contents of an advertisement published by the plaintiffs in the local newspaper (see p 5B of bundle DBND) to publicize the courses of study available at ICM, he was surprised by the extravagance of many of the plaintiffs' claims as set out in their advertisement. For this reason, so argued counsel, the words stated by the author about ICM in paras 7, 8 and 9 of the article complained of and the meaning attributable to them were clearly a manifestation of the honest opinion of the author suggesting that the plaintiffs qualifications must be viewed with care and caution. With due respect, I cannot accept this contention of counsel. In the first place, and as stated above, the statements made by the author of the said article in paras 7, 8 and 9 are statements of fact and not statements manifesting the comments let alone fair comments of the author. Secondly, there is absolutely nothing in the article read as a whole to suggest that the author was merely giving his opinion that the qualifications of ICM should be viewed with caution and care. On the contrary, anyone reading paras 7, 8 and 9 within the context of the article as a whole can only arrive at one conclusion, namely, that ICM was one of the organizations which operated a diploma mill to sell their bogus qualification. Thirdly, and more importantly, one must ask whether the author in making the statements was in fact honestly expressing his real view which as stated by Lord Denning in *Slim v Daily Telegraph Ltd*[6] is the cardinal test. I have already given my view regarding the honesty of the author earlier and I need not labour on this issue except to say that in my view the bona fide of the author in making the statement is highly questionable.

For the reasons stated above, I am fully satisfied that the said article is certainly defamatory of the plaintiffs in the manner contained in the charges (a)–(i) as set out in para 4 of the plaintiffs' amended statement of claim.

Damages

I shall now assess the damages to be awarded to the plaintiffs. First, under the head of special damages, the plaintiffs have given the following particulars:

(i)	Cost of plane ticket for the plaintiffs' representative to come to Malaysia to explain matters to the defendants' representative prior to instituting this action	... RM11,699.30
(ii)	Costs of hotel and food	... RM 1,146.36
(iii)	Other costs	... RM 534.30
		RM13,329.96

In respect of (i), PW1, the secretary and director of education of ICM had produced the necessary documents to show that he did travel by air from London to Singapore on 30 April 1985 and thence from Singapore to Kuala Lumpur on 1 May 1985 and the total cost of the air travel comes to the amount as claimed. Item (i) is therefore allowed. As to item (ii) he had also produced the necessary documents showing the hotel and food charges. Likewise, item (ii) is allowed. As no document had been produced to show the expenditure under item (iii), this item is rejected. Special damages in the sum of RM12,845.56 is hereby awarded to the plaintiffs.

The principles in the assessment of general damages have been succinctly laid down in the case of *Datuk Harris bin Mohd Salleh v Abdul Jalil bin Ahmad*[18] where the court held that the following consideration ought to be taken into account in assessing such damages:

(a) the position and standing of the plaintiffs;
(b) the conduct of the plaintiffs;
(c) the nature of the libel;
(d) the mode and extent of publication;
(e) the conduct of the defendants from the time of the libel down to the very moment of the verdict; and
(f) the absence or refusal of any retraction or apology.

I should also mention that where an action is brought by an individual in respect of a libel, the court may take into consideration in assessing the damages, any mental distress or illness caused to the plaintiffs as the result of the publication. But the element of mental distress and illness cannot be for obvious reason taken into account where the plaintiff is a corporation (as in the present case) where it can only 'be damaged in its pocket, so that it can only be compensated for loss of goodwill and loss of income; the court must take into account that corporation tax should have been payable on the income loss' — see *Lewis v Daily Telegraph*.[3] Since this court has been urged by counsel for the plaintiffs to impose exemplary or punitive damages in additional to aggravated compensatory damages, I would like to draw the attention of counsel to the following passages appearing in *Gatley on Libel & Slander* (8th Ed) at p 596 para 1456:

> A newspaper which reports news in an ordinary run-of-the-mill way and happens to make a mistake in its report is not to be mulcted in exemplary damages merely because what it does is done with a view to profit. On the other hand it is perfectly clear, from those authorities, that in a case in which a newspaper quite deliberately publishes a statement which it either knows to be false or which it publishes recklessly, careless whether it be true or false, and *on the calculated basis*

that any damages likely to be paid as a result of litigation will be less than the profit which the publication of that matter will give, then ... exemplary damages are permissible. The onus on this point is on the plaintiff and not on the defendant. (Emphasis added.)

It is clear from the abovementioned passages that the imposition of exemplary or punitive damages is not applicable in the present case simply because the plaintiffs have failed to discharge the onus of proving that 'on the calculated basis that any damages likely to be paid as a result of litigation will be less than the profit which the publication of that matter will give'. Furthermore in *Cassel v Broome*,[19] it has been said that the court should be slow in awarding exemplary damages if such damages may amount to double counting of the damages. In the present case, counsel for the plaintiffs has also urged this court to impose aggravated compensatory damages. Should this court agree to this suggestion of counsel, the imposition of exemplary damages may lead to the result of double counting of the damages. For the above reasons, I am not prepared to accede to the contention of counsel for the plaintiffs that exemplary damages should be imposed against the defendant.

As regards to the position and standing of the plaintiffs as well as their conduct, it is clear that the following statement appearing in the ICM brochure published in the *Business Times* of 10 September 1984 that: 'In its capacity as a commercial examining board it is the second largest in the world with registered business and management students in more than 40 countries', is pure exaggeration. Bearing in mind that the majority of the institutions of higher education in the United Kingdom have no knowledge of ICM and its qualifications, it is clear that the aforesaid statement was inserted as an advertising gimmick which no well-established professional body would have adopted unless there is some truth in the said statement. The conduct of the plaintiffs in making such a untrue statement is certainly open to adverse criticism bearing in mind that one sentence in the opening paragraph of the said brochure would certainly draw the attention of prospective students and lead them to believe that ICM is indeed the second largest commercial examining board in the world which in fact it is far from being so. The matters discussed above should therefore be taken into consideration against the plaintiffs in assessing the quantum of compensatory damages to be awarded to them.

With regard to the nature of the libel, I have no doubt that to accuse an institution of higher education of participating in the operation of a diploma mill racket and of selling its bogus qualifications for a fee (as in the present case) is most deplorable since such accusation would most probable than not cause parents of potential students, the students themselves who are contemplating whether to gain admission to such institution, professors and lecturers of institutions of higher education indeed any persons or bodies of persons who have anything to do with higher education to shun such diploma mill type of institution. Even though ICM may not be classified as the second largest commercial examining institution in the world and even assuming that ICM may not be a *senior* professional body (to which I cannot accede), nonetheless it certainly has a good reputation

as a genuine institution of higher education. The damage done to this reputation of the plaintiffs even if not irreparable would certainly take a very long time to remedy.

As regards to the standing of the defendants, it is to be noted that they were and still are publishers of a local leading English newspaper. This was so even in 1985. This court can take judicial notice of this. As such I accept the counsel's contention suggesting that the daily sale of the *New Straits Times* at the material time was within the region of 190,000 copies per day. Bearing in mind that one single copy of the newspaper would most likely than not be read by three to four persons, the total number of readers per day would easily reach the staggering figure of half a million. It might well be true (as suggested by counsel for the defendants) that not all the half million readers would be interested in the subject matter of the article complained of. However that may be, it cannot be gainsaid that the readers who were interested in the subject matter of the article complained of could still be in a position to spread the imputation made therein by word of mouth to their relatives and close friends who might not be a reader of the *New Straits Times* but who might well be interested in the said subject matter. The suggestion of counsel for the defendant is therefore neither here nor there. Be that as it may, one thing is certain — the extent of the publication of the article complained of was at the material time quite substantial.

As to the conduct of the defendants, I have already dealt with one aspect of their conduct when I was considering the issue of malice on the part of the defendants. Suffice it to say that they had or ought to have knowledge of the falsity of the imputations mentioned in the said article (see the article entitled 'Partial grant offer from this institute is genuine' published in the *New Straits Times* on 30 July 1983 — p 1 of bundle AB). Furthermore, when a reader chose to seek the help of the defendant in July 1983 to check on the authenticity of the partial grant offered by ICM, the defendants deemed it fit at that time to seek the assistance of the British Council in order to find an answer to the query, yet in 1985 when the author chose to make the serious imputations affecting the reputation of ICM, they chose to accept the words of the author and chose not to check with the British Council when under the circumstances as discussed earlier, they should have known that the imputation might not be true. It is also important to note that almost immediately after the publication of the article complained of, PW1 came to Malaysia to meet the defendants to convey to them the truth of the matter. PW1 in fact reminded the defendants that they were fully aware of ICM and its activities for the past three years. PW1 therefore pleaded with the defendants to publish a retraction of the said article. Indeed, PW1 had gone some length to explain matter to the defendants (see p 6B–F of the notes of evidence), but to no avail. This was followed up by the plaintiffs' solicitor writing a letter of 3 May 1985 (see p 3 of the bundle AB) to the defendant requesting them to retract the said article and to publish a suitable apology but again the defendants refused to respond. Instead, the defendant clearly took a belligerent stand against any action taken by the plaintiffs. Thus, on 12 June 1985, upon the service of the writ

on the defendant, their solicitors demanded security for costs in the sum of RM75,000 (see the solicitors' letter of 9 July 1985 p 6 of bundle AB). It might well be true that the defendant had the right under O 23 r 1 of the Rules of High Court 1980 to make such a demand. But the court in assessing damage is required, inter alia, to examine the conduct of the defendants from the time when the libel was published down to the very moment of the verdict — see *Praed v Graham*[20] at p 55. That being the case, the court has the right to take into consideration the conduct of the defendants in refusing to publish any retraction and tendering an apology after having been apprised of the groundlessness of the imputations made in the said article and instead went ahead strenuously to oppose the action of the plaintiffs, which conduct clearly shows that the defendants have no desire up to today to mitigate the damages — see per Lord Reid in *Morgan v Odhams Press Ltd*[21] at p 1247.

Taking all the above factors into consideration, I award the plaintiffs the sum of RM100,000 as compensatory damages. I also ordered that costs of the proceeds be taxed and paid by the defendants to the plaintiffs. The prayer for injunction by the plaintiffs has implicitly been abandoned by the plaintiffs and rightly so, since it serves no useful purpose in the circumstances of this case.

To summarize the awards granted to the plaintiffs, the plaintiffs are to be paid:

(a) as special damages the sum of RM12,795.66 which sum shall carry interest at the rate of 4%pa from the date of filing of this writ to the date of judgment and thereafter at the rate of 8%pa till the date of realization; and

(b) as general damages the sum of RM100,000 with interest at the rate of 8%pa from the date of this judgment till date of realization.

Order accordingly.

Reported by S Radhakrishnan